



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2011-0938; FRL-9922-73-Region 6]**

#### **Approval and Promulgation of Implementation Plans; New Mexico; Transportation Conformity and Conformity of General Federal Actions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action approving State Implementation Plan (SIP) revisions submitted by the State of New Mexico on October 28, 2011, November 1, 2013, and August 8, 2014. These revisions amend the State transportation conformity provisions and remove the State general conformity provisions from the SIP, as allowed by the 2005 amendments to the Clean Air Act (Act or CAA). These revisions also establish transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. Upon the effective date of this final action, the EPA federal rules will govern conformity of transportation Federal actions and general Federal actions within the State of New Mexico. This action is being taken in accordance with sections 110 and 176 of the Act.

**DATES:** This rule is effective on **[insert date 60 days after date of publication in the Federal Register]** without further notice, unless EPA receives relevant adverse comment by **[insert date 30 days after date of publication in the Federal Register]**. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2011-0938, by one of the following methods:

- *<http://www.regulations.gov>*: Follow the on-line instructions.
- E-mail: Jeffrey Riley at *[riley.jeffrey@epa.gov](mailto:riley.jeffrey@epa.gov)*.
- Mail or delivery: Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L),

Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

*Instructions:* Direct your comments to Docket ID No. EPA-R06-OAR-2011-0938. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *<http://www.regulations.gov>*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *<http://www.regulations.gov>* or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The *<http://www.regulations.gov>* website is an “anonymous access” system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *<http://www.regulations.gov>*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made

available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Riley, (214) 665-8542,

[riley.jeffrey@epa.gov](mailto:riley.jeffrey@epa.gov). To inspect the hard copy materials, please contact Mr. Riley or Mr. Bill Deese at (214) 665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

## **Table of Contents:**

- I. Background and Purpose
- II. EPA's Evaluation

### III. Final Action

### IV. Statutory and Executive Order Reviews

## **I. Background and Purpose**

### *A. Call to States for Conformity SIP Revisions*

In the CAA, Congress recognized that actions taken by Federal agencies could affect a State, Tribal, or local agency's ability to attain and maintain the NAAQS. Congress added section 176(c) (42 U.S.C. 7506) to the CAA to ensure Federal agencies' proposed actions conform to the applicable State Implementation Plan (SIP), Tribal Implementation Plan (TIP) or Federal Implementation Plan (FIP) for attaining and maintaining the NAAQS. That section requires Federal entities to find that the emissions from the Federal action will conform with the purposes of the SIP, TIP or FIP or not otherwise interfere with the State's or Tribe's ability to attain and maintain the NAAQS.

The CAA Amendments of 1990 clarified and strengthened the provisions in section 176(c). Because certain provisions of section 176(c) apply only to highway and mass transit funding and approvals actions, EPA published two sets of regulations to implement section 176(c). The Transportation Conformity Regulations, (40 CFR part 51, subpart T, and 40 CFR part 93, subpart A) first published on November 24, 1993 (58 FR 62188), address Federal actions related to highway and mass transit funding and approval actions. The General Conformity Regulations, (40 CFR part 51, subpart W, and 40 CFR part 93, subpart B) published on November 30, 1993 (58 FR 63214), cover all other Federal actions. These two conformity regulations have been revised numerous times.

When promulgated in 1993, the Federal transportation conformity rule at 40 CFR 51.395 mandated that the transportation conformity SIP revision incorporate several provisions of the rule in verbatim form, except in so far as needed to give effect to a stated intent in the revision to establish criteria and procedures more stringent than the requirements stated in these sections. Similarly, 40 CFR 51.851 required the State's general conformity provisions must contain criteria and procedures that are no less stringent than the Federal general conformity regulation; however, the State could establish more stringent general conformity criteria and procedures if they apply equally to non-Federal, as well as Federal, entities.

#### *B. What is Transportation Conformity?*

Transportation conformity is required under Section 176(c) of the Clean Air Act to ensure that Federally supported highway projects, transit projects, and other activities are consistent with ("conform to") the purpose of the SIP. Transportation conformity currently applies to areas that are designated nonattainment, as well as those areas redesignated to attainment after 1990 (maintenance areas), with plans developed under section 175A of the Act for the following transportation related pollutants: Ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>), carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS). The transportation conformity regulation is found in 40 CFR part 93, subpart A and provisions related to conformity SIPs are found in 40 CFR 51.390.

#### *C. What is General Conformity?*

General Conformity is also a requirement of section 176(c) of the CAA to ensure that no Federally supported actions outside of highway and transit projects interfere with the purpose of

the approved SIP, i.e. the SIP's protection of the NAAQS. General conformity requirements currently apply to the following criteria pollutants: Ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>), carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>), sulfur dioxide (SO<sub>2</sub>) and lead. The general conformity regulation is found in 40 CFR part 93, subpart B and provisions related to conformity SIPs are found in 40 CFR 51.851.

*D. Transportation Conformity Provisions Affected by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU)*

On August 10, 2005, the SAFETEA–LU was signed into law streamlining the requirements for conformity SIPs at section 176(c) of the CAA. Prior to SAFETEA–LU, states were required to address all of the Federal conformity rule's provisions in their conformity SIPs. After SAFETEA–LU amended CAA section 176(c)(4)(E) and EPA revised 40 CFR 51.390 to be consistent with those amendments, states are required to address and tailor only three sections of the conformity rule in their transportation conformity SIPs. These three sections of the Federal rule which must meet a state's individual circumstances are: 40 CFR 93.105, which addresses consultation procedures; 40 CFR 93.122(a)(4)(ii), which requires that written commitments be obtained for control measures that are not included in a Metropolitan Planning Organization's (MPO's) transportation plan and transportation improvement program prior to a conformity determination, and that such commitments be fulfilled; and, 40 CFR 93.125(c) which requires that written commitments be obtained for mitigation measures prior to a project level conformity determination, and that project sponsors must comply with such commitments. In general, states are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule.

*E. General Conformity Affected by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU)*

On August 10, 2005, SAFETEA–LU was signed into law, and among other things, it amended the CAA to eliminate the requirement for States to adopt and submit General Conformity SIPs. On April 5, 2010 (75 FR 17254), EPA updated the General Conformity SIP Regulations to, among other things, be consistent with SAFETEA–LU by eliminating the Federal regulatory requirement for states to adopt and submit general conformity SIPs, instead making submission of a general conformity SIP a state option. See 40 CFR 51.851.

*F. Prior New Mexico Conformity SIP Revision Actions*

On September 9, 1998 (63 FR 48106), EPA approved New Mexico Administrative Code (NMAC) 20.2.98, “*Conformity of General Federal Actions to the State Implementation Plan*”. New Mexico’s rule mirrored and specifically referenced the federal requirements in 40 CFR part 93, subpart B and 40 CFR part 51, subpart W.

On March 20, 2000 (65 FR 14873), EPA approved NMAC 20.2.99, “*Conformity to the State Implementation Plan of Transportation Plans, Programs and Projects*.” New Mexico’s rule mirrored and specifically referenced the federal requirements in 40 CFR part 93, subpart A and 40 CFR part 51, subpart T. On April 23, 2010 (75 FR 21169), EPA approved revisions to NMAC 20.2.99 submitted by the State of New Mexico on November 2, 2006, June 27, 2007, and May 13, 2009.

*G. State Submittals*

On October 10, 2011, the State of New Mexico submitted a SIP revision consisting of amendments to NMAC 20.2.99, *Conformity of the State Implementation Plan of Transportation Plans, Programs, and Projects*. The revision consisted of language to reflect the March 24, 2010

(75 FR 14260) amendments to 40 CFR Part 93, Subpart A to address PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment areas.

On September 26, 2012 the Secretary of NMED submitted a letter to EPA requesting that EPA only consider and act upon three elements (40 CFR 93.105; 93.122(a)(4)(ii); and 93.125(c)) contained in its October 10, 2011 transportation conformity SIP submittal, pursuant to the SAFETEA-LU amendments to CAA section 176(c)(4)(E). The October 10, 2011 SIP submittal did not contain any revisions to the EPA-approved transportation conformity SIP to remove/repeal additional provisions beyond the three above-noted elements, and thus these additional provisions no longer required under SAFETEA-LU remained in the SIP. The September 26, 2012 letter was intended to streamline the New Mexico transportation conformity SIP, pursuant to SAFETEA-LU amendments the CAA. Together the October 10, 2011 SIP revision and the September 26, 2012 letter were insufficient to achieve the intended streamlining.

On August 8, 2014, the State of New Mexico submitted an additional SIP revision consisting of the SAFETEA-LU required SIP elements and a repeal of the remainder of NMAC 20.2.99, which contained state requirements that were beyond what is required by SAFETEA-LU. The repeal of NMAC 20.2.99 eliminates the need for the state to undertake additional rulemaking to revise their state rules by incorporating by reference the federal rules on Transportation Conformity.

On November 1, 2013, the State of New Mexico submitted SIP revisions consisting of a repeal of NMAC 20.2.98, *Conformity of General Federal Actions to the State Implementation Plan*. The repeal of the state rule is intended to eliminate the need for future state rule revisions as a result of amendments to federal regulations. Section 6011(f) of SAFETEA-LU revised section



176(c)(4)(A) of the CAA by deleting the requirement for the states to adopt and submit a General Conformity SIP.

## **II. EPA's Evaluation**

We have reviewed New Mexico's submittals to ensure consistency with the current Clean Air Act, as amended by SAFETEA-LU, and EPA regulations governing state procedures for transportation and general conformity (40 CFR part 93, subparts A and B, 40 CFR 51.390, and 40 CFR 51.851).

The November 1, 2013 revision, upon final approval by EPA, removes 20.2.98 NMAC, "*Conformity of General Federal Actions to the State Implementation Plan*," from the SIP. With the removal of 20.2.98 NMAC from the SIP, the federal rules in 40 CFR Part 93, Subpart B will directly govern conformity of general federal actions in the State of New Mexico. In addition, New Mexico's November 1, 2013 revision meets the requirements set forth in section 110(l) of the CAA with respect to adoption and submission of SIP revisions. 40 CFR part 93, subpart B continues to subject certain federal actions to general conformity requirements without the need for identical state rules and SIPs. Therefore, repealing the state rule will not impact continuity of the general conformity program in New Mexico, and consequently meets the requirements of section 110(l).

Together, the October 10, 2011 and August 8, 2014 revisions, upon final approval by EPA, remove specific provisions of 20.2.99 NMAC, "*Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects*", from the SIP that are no longer required in light of the SAFETEA-LU amendments. With the removal of these specific provisions of 20.2.99 NMAC from the SIP, the federal rules in 40 CFR part 93, subpart A will directly govern transportation conformity of federal actions in the State of New Mexico. This revision complies

with the requirements of CAA section 176(c)(4)(e) and 40 CFR 51.390(b). In addition, New Mexico's October 10, 2011 and August 8, 2014 SIP revisions meet the requirements set forth in section 110(l) of the CAA with respect to adoption and submission of SIP revisions. 40 CFR part 93, subpart A continues to subject certain federal actions to transportation conformity requirements without the need for identical state rules and SIPs. Therefore, repealing the state rule will not impact continuity of the transportation conformity program in New Mexico.

In addition to provisions addressing the requirements at 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c), the State's August, 2014 submittal also includes revisions to definitions and changed language to clarify the scope, applicability, and statutory authority of the state's transportation conformity SIP.

### **III. Final Action**

We are taking direct final action to approve revisions to the New Mexico SIP submitted on October 10, 2011, November 1, 2013, and August 8, 2014, that pertain to removal of NMAC 20.2.98, "*Conformity of General Federal Actions to the State Implementation Plan*," and specific provisions of NMAC 20.2.99, "*Conformity to the State Implementation Plan of Transportation Plans, Programs, and Projects*" from the SIP. The approval of New Mexico's conformity SIP revisions will align the New Mexico SIP with the current Clean Air Act conformity requirements, as amended by SAFETEA-LU, and the most recent EPA regulations governing state procedures for transportation and general conformity.

EPA is publishing this rule without prior proposal because we view this as a non-controversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This

rule will be effective on **[insert date 60 days after date of publication in the Federal Register]** without further notice unless we receive relevant adverse comment by **[insert date 30 days after date of publication in the Federal Register]**. If we receive relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive relevant adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 28, 2015.

Samuel Coleman,

*Acting Regional Administrator, Region 6.*

Therefore, 40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

**Subpart GG – New Mexico**

2. In §52.1620, the first table in paragraph (c) entitled “EPA Approved New Mexico Regulations” is amended by:

- a. Removing the entry for “Part 98, General Conformity.”
- b. Revising the entries for “20.2.99.1 – 20.2.99.112.”
- c. Removing the entries for “20.2.99.113 – 20.2.99.154.”

The revisions read as follows:

**§52.1620 Identification of plan.**

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(c) \* \* \*

**EPA APPROVED NEW MEXICO REGULATIONS**

State citation	Title/subject	State approval/effective date	EPA approval date	Comments
* * * * *				
<b>Part 99 – Transportation Conformity</b>				
20.2.99.1	Issuing Agency	7/11/2014	<u>[Insert the date of publication in the Federal Register]</u> <u>[Insert Federal Register Citation]</u>	

20.2.99.2	Scope	7/11/2014	<u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u>	
20.2.99.3	Statutory Authority	7/11/2014	<u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u>	
20.2.99.4	Duration	7/11/2014	<u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u>	
20.2.99.5	Effective Date	7/11/2014	<u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u>	
20.2.99.6	Objective	7/11/2014	<u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u>	
20.2.99.7	Definitions	7/11/2014	<u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u>	



20.2.99.8	Documents	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.9 to 20.2.99.100	[Reserved]	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.101	Applicability	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.102	Consultation	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.103	Agency Roles in Consultation	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.104	Agency Responsibilities in Consultation	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	

20.2.99.105	General Consultation Procedures	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.106	Consultation Procedures for Specific Major Activities	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.107	Consultation Procedures for Specific Routine Activities	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.108	Notification Procedures for Routine Activities	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.109	Conflict Resolution and Appeals to the Governor	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.110	Public Consultation Procedures	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	

20.2.99.111	Enforceability of Design Concept and Scope and Project-Level Mitigation and Control Measures	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	
20.2.99.112	Savings Provision	7/11/2014	<b><u>[Insert the date of publication in the Federal Register] [Insert Federal Register Citation]</u></b>	

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[FR Doc. 2015-02585 Filed 02/09/2015 at 8:45 am; Publication Date: 02/10/2015]